Johore State Economic Development Corp v Queen Bee Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 11-5 OF 1992
ABDUL MALIK ISHAK J
24 JUNE 1995

Evidence *— Hearsay — Documentary hearsay — Admissibility — Whether maker could not be found despite reasonable efforts — Evidence of reasonable efforts — Whether statement contemporaneous to events stated therein — Evidence Act 1950 ss 73A(1) and (6)*

Contract *— Damages — Special damages — Necessity of proof*

Landlord and Tenant *— Fixtures — Tenant installed airconditioning ducts on premises at its own expense — Landlord prevented tenant from dismantling on termination of tenancy — Whether tenant entitled to damages — Compensation — Award to take into account depreciation of airconditioning ducts*

The appellants were the owners of a building. Part of the building was rented out to the respondents for a period of five years commencing from 15 May 1977. This tenancy agreement was extended. The parties mutually consented to terminate the tenancy agreement on 31 March 1986. The respondents contended that they had to install air-conditioning ducts to the demised premises at the time of entry and incurred expenses. When the tenancy agreement was terminated, the appellants prevented the respondents from dismantling the air-conditioning ducts. A claim was instituted at the magistrates' court and after trial, the appellants were ordered to pay RM15,250 with interest and costs to the respondents. Reliance was made on a letter tendered by the respondents as the basis to award the said amount. However, the maker of that letter was not called to substantiate the evidence. The appellants appealed against the award.

Held, allowing the appeal:

(1) The magistrates' court erred in admitting and relying upon the letter tendered by the respondents to make the award as to the price of the air-conditioning ducts. The statement made in the letter was not made contemporaneously with the occurrence or existence of the facts stated therein to bring it within the purview of s 73A(6) of the Evidence Act 1950. The letter was written on 1 December 1976 but adverted to events that happened on 30 November 1976. Further, there was no evidence to show that reasonable efforts had been made to trace the author of the letter to enable the respondents to rely upon the proviso to s 73A(1) of the Evidence Act 1950.

(2) The magistrates' court was wrong to award the respondents damages in the absence of actual proof.

(3) The magistrates' court erred in making an erroneous estimate of damages without taking into account depreciation of the air-conditioning ducts.

[Bahasa Malaysia summary

Perayu adalah tuanpunya sebuah bangunan. Sebahagian daripada bangunan itu telah disewa kepada penentang untuk tempoh lima tahun bermula dari 15 Mei 1977. Perjanjian penyewaan ini telah dilanjutkan. Pihak-pihak itu kemudiannya bersetuju untuk menamatkan penyewaan itu pada 31 Mac 1986. Penentang berhujah bahawa mereka telah memasang salur penyaman udara pada premis yang disewa itu apabila mereka mula menduduki premis itu dan telah membelanjakan wang. Apabila perjanjian penyewaan itu ditamatkan, perayu telah menyekat penentang dari mengeluarkan salur penyaman udara itu. Satu tuntutan telah dimulakan di mahkamah majistret dan selepas perbicaraan, perayu telah diperintahkan membayar RM15,250 bersama bunga dan kos kepada penentang. Sepucuk surat yang dikemukakan oleh penentang telah digunakan sebagai asas untuk mengawardkan jumlah itu. Walau bagaimanapun, orang yang menulis surat itu tidak dipanggil untuk menyokong keterangan itu. Perayu merayu terhadap award itu.

Diputuskan, membenarkan rayuan itu:

(1) Mahkamah majistret telah membuat kesilapan ketika menerima dan bergantung kepada surat yang dikemukakan oleh penentang untuk membuat award berkenaan harga salur penyaman udara itu. Kenyataan yang dibuat di dalam surat itu tidak dibuat semasa dengan kejadian atau kewujudan fakta-fakta yang dinyatakan di sana supaya membawanya masuk ke dalam lingkungan s 73A(6) Akta Keterangan 1950. Surat itu ditulis pada 1 Disember 1976 tetapi merujuk kepada kejadian yang berlaku pada 30 November 1976. Lagipun, tidak terdapat keterangan untuk menunjukkan bahawa usaha yang munasabah telah dilakukan untuk mengesan penulis surat itu untuk membolehkan penentang bergantung pada proviso kepada s 73A(1) Akta Keterangan 1950.

(2) Mahkamah majistret tersilap apabila memberikan award ganti rugi kepada penentang tanpa adanya bukti sebenar.

(3) Mahkamah majistret tersilap ketika membuat anggaran ganti rugi yang salah tanpa mengambil kira susut nilai salur penyaman udara itu.]

Notes

For cases on hearsay and documentary evidence, see 7 *Mallal's*

A *Digest* (4th Ed, 1995 Reissue) paras 1004–1066; [1994] *Mallal's Digest* 1327–1331; [1995] *Mallal's Digest* 983–985.

For cases on damages in contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1016–1017; [1993] *Mallal's Digest* 464–468; [1994] *Mallal's Digest* 730–742; [1995] *Mallal's Digest* 514–531.

B For cases on fixtures, see 9 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1016–1017; [1995] *Mallal's Digest* 1215.

Cases referred to

Admiralty Commissioners v SS Susquehanna [1926] AC 655 (folld)

C *Amann Aviation Pty Ltd v Commonwealth of Australia* (1990) 92 ALR 601 (folld)

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 (folld)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99 (refd)

D *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 71 (folld)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239 (folld)

Muller & Phipps (M) Sdn Bhd v Penang Port Commission [1974] 2 MLJ 39 (folld)

Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min [1980] 1

E MLJ 291 (refd)

Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1994] 3 MLJ 53; [1994] 4 CLJ 757 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 (folld)

F *Yeap Cheng Hock v Kajima Taisei Joint Venture* [1973] 1 MLJ 230 (refd)

Zainal Abidin bin Sulaiman & Ors v Hoya Holdings Sdn Bhd (1993) 2 AMR 31:1376 (refd)

Legislation referred to

G Evidence Act 1950 ss 73A(1), (6)

Jeyakumar Sundralingam (*Reginald Vallipuram & Co*) for the appellants.

Elyas Majeed (*Elyas Majeed & Co*) for the respondents.

H **Abdul Malik Ishak J:** The appellants owned a building known as Tun Abdul Razak Complex and rented out an area of approximately 4,696 sq ft on the second floor of the said building, at the podium level to the respondents ('demised premises') for a period of five years commencing from 15 May 1977 at monthly rentals calculated on the following basis:

I (i) first year at RM5,525 per month;

(ii) second year at RM5,850 per month;

(iii) third year at RM6,175 per month; and

(iv) remaining two years at RM6,500 per month.

The tenancy agreement (exh P1) was scheduled to end on 14 May 1982 but somehow it was extended (though there was no evidence adduced towards this end) and finally the parties mutually consented to terminate the tenancy agreement on 31 March 1986 as reflected in the statement of claim of the respondents and the appellants had agreed to these set of facts in their statement of defence. Indeed, these were the evidences that were introduced before the magistrate's court, Johor Bahru. The trial before the magistrate's court, Johor Bahru was surprisingly conducted by a judge of the sessions court, Johor Bahru ('trial court').

It was in evidence that when the respondents rented the demised premises it was totally empty. The respondents installed airconditioning ducts to the demised premises and incurred expenses. Upon the expiry of the tenancy agreement the respondents wanted to dismantle the airconditioning ducts but were prevented by the appellants. In any event, the trial court ordered the appellants to pay RM15,250 with interest calculated at 8% pa from 16 January 1992 till realisation and costs to the respondents.

It has been argued before me that the trial court had erred in ordering the appellants to pay RM15,250 for the airconditioning ducts whilst the respondents argued that the order of the trial court was perfectly in order and that it should be confirmed.

It is apparent that the trial court relied heavily on a letter tendered by the respondents through its witness Haji Mohd Said bin Alwee (PW1) ('Haji Said') as the basis to award that amount to the respondents. That letter was marked as exh ID3 and for brevity I reproduce that letter as follows:

> Forley & Sons (Johor) Sdn Bhd
>
> Head Office: No 113E, Jalan Tun Abdul Razak,
> Johor Bahru.
> Tel: 53063 & 223967
>
> Branch Office: No 89, Jalan Keris Satu, Taman Sri Tebrau,
> Johor Bahru.
> Tel: 321059 & 333219
>
> Your Ref: MEM/CH/920
>
> Date: 1.12.86
>
> M/s Elyas Majeed & Co,
> Peguambela dan Peguamcara,
> No 7, 1st Floor,
> Jalan Tan Hiok Nee,
> 80000 Johor Bahru.
>
> Re: Installing Air-Conditioning Duct at Queen Bee Nite Club, Tun Abdul Razak Complex, Johor Bahru.
>
> With reference to your letter dated 6 November 1986, we hereby confirmed that air-conditioning duct at Queen Bee Nite Club, Tun Abdul Razak

A Complex, Johor Bahru being supplied and installed by us on 30 November 1976 at the cost of $15,250 (Dls: Fifteen Thousand Two Hundred and Fifty) only.

Yours faithfully,

(Signed in Chinese character)
B FORLEY & SONS (JOHOR) SDN BHD
No 113-E, Jalan Tun Abdul Razak, Johor Bahru
Tel: 223967, 220103

Two things need to be highlighted in regard to exh ID3. Firstly, it was dated 1 December 1986, and secondly, it stated that the airconditioning C duct(s) were installed on 30 November 1976 (before the tenancy agreement was signed between the parties) at RM15,250.

In examination-in-chief, Haji Said testified that the receipt for payment of the airconditioning ducts was misplaced and he could not product that receipt in court. On being recalled Haji Said testified that D concerted attempts by him to trace Forley & Son Sdn Bhd ('Forley') were unsuccessful. This was what Haji Said said:

> Saya telah cari Forley & Sons yang mana syarikat itu telah tiada. Saya puas cari Forley tapi tak berjaya, sudah banyak kali cari. Tak ada siapa yang tinggal di kawasan itu lagi sekarang. Oleh itu saya tak dapat kemukakan maker of ID3.

E Under cross-examination, pertinent points surfaced. Haji Said testified that the last time he met Forley was when the company installed the airconditioning ducts in 1986. Before 1986, he never met Forley and in the same year he knew Forley had their business address at Jalan Ngee Heng (now known as Jalan Tun Razak). Haji Said admitted that he did F not go to the branch office of Forley.

Since the main plank of the respondents' case rested on ID3, it became incumbent on the respondents' part to produce the maker of ID3 in order to give it the stamp of admissibility. The trial court tackled the issue of non-production of the maker of ID3 in this fashion:

G

> Cuma mahkamah terkilan sedikit mengapakah plaintif yang sudah tahu wujudnya branch office Forley & Sons di Jalan Sri Tebrau tidak mahu bertanya di sana.

The trial court next proceeded in the realm of conjecture unsupported by evidence when it reasoned that:

H

> Walaupun saya berpendapat mungkin tiada gunanya plaintif pergi ke branch office Forley & Sons di Jalan Sri Tebrau kerana itu hanya branch office yang kecil kemungkinannya dokumen dari main office di jumpai di situ.

I Finally, the trial court came to the conclusion that since the appellants were still using the airconditioning ducts it would not be unreasonable for the appellants to pay RM15,250 to the respondents. This was what the trial court said:

> Dengan yang demikian dalam imbangan kemungkinan saya membenarkan tuntutan plaintif ini bagi jumlah $15,250 (this must be in Malaysian ringgit). Memandangkan air conditioning duct ini masih di gunakan oleh pihak defendan saya rasa jumlah tersebut tidaklah keterlaluan dan defendan patut jugalah memberi pertimbangan mengenai keadaan itu. Atas pertimbangan itu jugalah maka saya membenarkan tuntutan plaintif ini.

The proviso to s 73A(1) of the Evidence Act 1950 enacts as follows:

> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

and the respondents sought to bring itself within the words 'if all reasonable efforts to find him have been made without success.' Have they succeeded in doing so? On the available evidence it can be said that the respondents did not take all reasonable efforts to trace Forley. Haji Said admitted under cross-examination that he did not proceed to the branch office of Forley and I may add that neither did he telephone that branch office of Forley nor did he make the necessary searches at the office of the Registrar of Companies to ascertain the current address of Forley. On what kind of evidence that needs to be introduced to trigger the proviso of sub-s (1) of s 73A of the Evidence Act 1950, Suffian LP, in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 (FC) had this to say:

> At the trial Mr Tay tried to have this letter admitted in evidence under s 73A(1) of the Evidence Act, ie without calling anybody from the company to give evidence. Mr Tay called as witness a clerk of the plaintiff's solicitor who said that he went to the company's premises on 11 July 1975, but found its sign-board missing and was told by some people on the first floor that the company had shifted but nobody knew where to and that he could not find the company's address in the phone book either. The learned trial judge did not admit the letter on the ground that the witness never enquired of the Business Registration Department nor of the Registry of Companies. With respect I think that in these circumstances not all reasonable efforts have been made to find the author of the letter within the meaning of the proviso to sub-s (1) of s 73A of the Evidence Act and that therefore the learned judge was right in refusing to admit the letter.

Likewise here Haji Said did not show that reasonable efforts have been made to trace the author of ID3. No enquiries were made by Haji Said at the Business Registration Department to trace the whereabouts of Forley.

In *Muller & Phipps (M) Sdn Bhd v Penang Port Commission* [1974] 2 MLJ 39, Chang Min Tat J, in regard to the admissibility of an invoice had this to say:

> Now, this invoice had never been introduced into evidence at any time before the plaintiffs' last witness. It was never previously mentioned in

any affidavit of documents. As a matter of fact, the plaintiffs had at no time made such disclosure, even when pressed to do so by the solicitors for the defendants, though it must be said that the defendants would appear to be remiss in not compelling disclosure. Be that as it may, the invoice was a document that in the course of shipping did not need to be shown to the defendants as the party with the responsibility of operating a port. It might be needed for clearance by excise but for unloading purposes, the defendants needed no more than the bill of lading and a note of the markings on the cases. Then, of course, an invoice is a unilateral declaration, not made under oath, by a party who in this case was not a party to the action and not called as a witness.

Mr Lim Peng Siew for the defendants made two points. First, he submitted that the invoice was inadmissible in the way in which it was sought to put it in. He relied on the authority of *Sin Tiew Bee v PP* [1973] 2 MLJ 200 (FC). Secondly, he contended that the invoice even if admissible was not sufficient to establish the contents of the cases. What was needed at least was the evidence of the packer and the checker in addition to that of the exporter.

In my view and with respect, even after hearing Mr Mohideen in reply, the submissions of Mr Lim Peng Siew were sound. I ruled the invoice inadmissible.

Perhaps to understand *Muller & Phipps (M) Sdn Bhd v Penang Port Commission* (supra) better it is appropriate to set out the facts of that case. There the plaintiffs imported three packages of certain articles which were unloaded at the defendants' wharf. The cases were in apparent good order and condition. The goods were not opened or examined as the cases outwardly looked intact and untampered with. A copy of the bill of lading which did not indicate the nature or contents of the three cases was delivered to the defendants. The goods were stored in the defendants' godowns and after a period of seven days the plaintiffs took delivery of the three packages. The agent of the plaintiffs thereupon noticed that one of the packages was too light. He then requested an outward survey which was done in the presence of this agent, representatives of the defendants and certain other officials. There were shortages discovered in the contents of two of the three packages. The plaintiffs could only ascertain their detailed loss when they received their invoice. The claim was for this loss, alleging failure on the part of the defendants to make full delivery implying that the goods were lost while in the custody of the defendants. The plaintiffs sought to prove their claim by means of the invoice as conclusive proof of the shipment.

It would appear that in *Muller & Phipps (M) Sdn Bhd v Penang Port Commission* (supra), the invoice was only introduced at the last minute without sufficient proof to support its admissibility. Here too though ID3 was adverted to in the course of the trial by Haji Said yet the maker of ID3 was not called thereby putting into question the contents of ID3. To compound the matter further ID3 was made on 1 December 1986 and it adverted to events that had happened in 1976, to be precise on 30 November 1976. It cannot therefore be said that the

statement in ID3 was made contemporaneously with the occurrence or existence of the facts stated therein as to bring it within the purview of sub-s (6) of s 73A of the Evidence Act 1950. On the printed evidence it is obvious that the trial court had misapprehended the law when it admitted and relied upon ID3 to award the respondents RM15,250 as the price of the airconditioning ducts. Put bluntly, the trial court had acted on a wrong principle of law and on this ground alone the appeal should be allowed.

Next, it was argued that the trial court in awarding RM15,250 for the airconditioning ducts misconstrued the principle that special damages must be specifically proved. It is correct to say that special damages belong to those class of damages that can be calculated and computed in monetary terms. The respondents under the law must not only specifically plead special damages as was rightly done but they need to go one step further to prove it. The respondents cannot simply write down the particulars and leave it to the trial court to decide. The respondents took a perilous course when they decided to throw the special damages for the trial court to adjudicate. The obvious reason which I can think of for special damages to be specifically pleaded is to crystallize the issue and enable the combatants to prepare for trial. In so far as the trial before the trial court was concerned the appellants were well prepared and they certainly knew what to expect and indeed demonstrated their readiness right from the start (*Yeap Cheng Hock v Kajima Taisei Joint Venture* [1973] 1 MLJ 230 and *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99).

In *Admiralty Commissioners v SS Susquehanna* [1926] AC 655, Viscount Dunedin stated the law and which is now trite as follows:

> If there be any special damage which is attributable to the wrongful act, that special damage must be averred and proved and, if proved, will be awarded.

The recent judgment of the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 (FC), demonstrates once again the need to prove damages to the hilt. In a well written judgment, Edgar Joseph Jr FCJ set out the principles lucidly. His Lordship had this to say:

> Firstly, that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177, 178:
>
> > '... plaintiffs must understand that if they bring action for damages it is for them to prove their damage; it is not enough to write down

A the particulars, so to speak, throw at the head of the court, saying: "This is what I have lost, I ask you to give me these damages." They have to prove it.'

This dictum was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] MLJ 187.

B And, in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989]) 3 MLJ 360, the court had occasion to say this (at p 367):

'It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a
C right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* and *Twyman v Knowles*.

D In *Malaysian Rubber Development Corp Bhd v Glove Sdn Bhd* [1994] 3 MLJ 569, at p 582E to F, Mohd Dzaiddin SCJ, speaking for the Supreme Court quoted, with approval, the above passage in the *Popular Industries* case.

Way back in 1960, in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ
E 17 (CA), Thomson CJ relied upon the dictum of Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel, Ltd* (1948) 64 TLR 177 at p 178 and adopted a strict attitude towards the burden of proving special damages. This was how his Lordship tackled the problem:

Then he claimed what he called special damages amounting to the sum of $4,888.92.
F

Of this, $2,888.92 was said to be for 'travelling, board, subsistence and other' expenses incurred by him between May 1953, and March 1955, in connection with the agreement. There is not a scrap of evidence as to any connection between the expenditure of this sum and the appellant's repudiation of the agreement and in the absence of such evidence the respondent is not entitled to recover anything.
G

(See also *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530; [1994] 4 CLJ 757 and *Zainal Abidin bin Sulaiman and 26 Others v Hoya Holdings Sdn Bhd* [1993] 2 AMR 31:1376.)

It is my considered view that damages are not meant to be punitive
H in nature but rather compensatory so as to put the respondents in the same or similar position, as far as possible, as the respondents would have been had the tenancy agreement not been mutually terminated. But the compensation would certainly not benefit the respondents financially or place them in a better financial position if the tenancy agreement had not been mutually terminated. However, it is important
I that the respondents here establish by evidence their losses and the trial court should not grant the respondents by way of damages in the absence of actual proof thereof. The trial court should have proceeded one step further by considering the depreciating value of the

airconditioning ducts as they were almost ten years old at the time the tenancy agreement was mutually terminated by the parties. This brings me to the next ground of appeal advanced by the appellants and this related to the failure of the trial court to consider the depreciating value of the airconditioning ducts.

The appellants' sole witness was Mohd Zam bin Mustaman (DWI) and in examination-in-chief, he said, inter alia, that the depreciating value of the airconditioning ducts were RM4,785.65. This was not considered at all by the trial court. It is an undisputed fact that the airconditioning ducts were installed on 30 November 1976 and those equipments remained there till 31 March 1986. For that period of time depreciation must have set in.

Hill and Redman's Law of Landlord and Tenant (16th Ed) by Michael Barnes at p 531, contains an illuminating passage which is reproduced below:

> Where a tenant, or a person claiming under him, has the right to sever and remove fixtures, he may maintain an action against any person upon whom the claim is binding who has prevented him from exercising that right. The measure of damages will be the value of the fixtures as severed (*London and Westminster Loan and Discount Co Ltd v Drake* (1859) 6 CB (NS) 798).

Burchett J, in *Amann Aviation Pty Ltd v Commonwealth of Australia* (1990) 92 ALR 601 at p 648 stated:

> Upon the principles which have been discussed in these reasons, the appellant is entitled to damages assessed on the basis that that expenditure should be recouped. It also follows, however, that the appellant should not receive the amount of net profit calculated without allowance for depreciation.

By way of analogy, reference may be made to the case of *Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min* [1980] 1 MLJ 291 (FC), when Suleiman FJ said:

> It is plain that although the maximum amount which the insurance can be called upon to pay is the estimated value of the car as stated in the policy, it does not follow that they will always be obliged to pay the whole amount even though the car is completely lost or destroyed (see *Shawcross on Motor Insurance* (2nd Ed) pp 508–509). The learned arbitrator had obviously taken into account depreciation.

Reverting back to *Tan Sri Khoo*'s case (supra), his Lordship Edgar Joseph Jr FCJ said:

> It goes without saying, that if the effect of allowing a plaintiff's claim, is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated in the cases cited above. This means that any profit which he stands to make because of the breach, must be deducted from the damages awarded — a point aptly put by Mr Hugh Beale in his most useful book *Remedies for Breach of Contract.*

His Lordship then proceeded to quote in extenso some passages from the said book which I do not propose to reproduce.

All these authorities show the need to take into account depreciation and, in the context of this appeal, the depreciating value of the airconditioning ducts must be arrived at on the date of the mutual termination of the tenancy agreement and this was on 31 March 1986. The appellants at para 7 of their amended statement of defence adverted to the question of depreciation and their sole witness too harped on the same point (evidence of Mohd Zam), yet the trial court saw it fit to ignore those evidences. Without a doubt, the trial court clearly had acted on a wrong principle and had made an entirely erroneous estimate of the damages (*Tan Sri Khoo*'s case, supra).

For these reasons, I allowed the appeal with costs and I also ordered that the award of RM15,250 made against the appellants be set aside. In substitution thereof, I ordered that a sum of RM4,785.65 which was the depreciating value of the airconditioning ducts be awarded to the respondents without interest. Finally, the deposit in the sum of RM18,552.89 which the appellants had deposited with the court be returned to the appellants without interest.

Appeal allowed.

Reported by PY Lo